Supreme Court, U.S.
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No. 03-1537

In The

Supreme Court of the United States

RICHARD MILLER WALKER,

Petitioner,

v.

THE STATE OF TEXAS,

Respondent.

On Petition For Writ Of Certiorari To The Court Of Appeals For The Fourteenth Supreme Judicial District Of Texas

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I.

WHETHER § 19.02(d) OF THE TEXAS PENAL CODE AND ITS CONSTRUCT, WHICH PLACES THE BURDEN ON A DEFENDANT IN A MURDER PROSECUTION TO PROVE BY A PREPONDERANCE OF THE EVIDENCE "SUDDEN PASSION ARISING FROM AN ADEQUATE CAUSE," AS OPPOSED TO REQUIRING THE STATE TO NEGATE THE SAME BY EVIDENCE BEYOND A REASONABLE DOUBT, BY MERELY CHARACTERIZING "SUDDEN PASSION ARISING FROM AN ADEQUATE CAUSE" AS A SENTENCING FACTOR THAT BEARS SOLELY ON THE EXTENT OF PUNISHMENT, PASSES CONSTITUTIONAL MUSTER AND DOES NOT VIOLATE DUE PROCESS OF LAW IN LIGHT OF *APPRENDI V. NEW JERSEY*.

II.

WHETHER THE DISTRICT COURT CONSTITUTIONALLY ERRED BY REFUSING TO PLACE THE BURDEN ON THE STATE TO DISPROVE THAT THE PETITIONER ACTED WITH "SUDDEN PASSION ARISING FROM AN ADEQUATE CAUSE," AS SPECIFICALLY REQUESTED BY THE DEFENSE.

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

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PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

The opinion of the Court of Appeals for the Fourteenth Supreme Judicial District appears at Appendix A and is unpublished.

JURISDICTION

The date on which the Texas Court of Criminal Appeals refused the petitioner's Petition for Discretionary Review was February 11, 2004 and appears at Appendix B.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Const., amend. V

> No person shall . . . be deprived of life, liberty, or property, without due process of law. . . .

United States Const., amend. VI

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed. . . .

United States Const., amend. XIV, § 1

> . . . nor shall any State deprive any person of life, liberty, or property, without due process of law. . . .

STATEMENT OF THE CASE

Course of Proceedings and Disposition in the Court Below

On October 29, 2001, the petitioner was convicted of the offense of murder, proscribed by § 19.02(b)(1) and § 19.02(b)(2) of the Texas Penal Code. The sentencing phase began on the same date and concluded on November 2, 2001, when the jury assessed punishment at confinement in the Institutional Division of the Texas Department of Criminal Justice for a period of seventy-five (75) years and imposed a fine of $10,000. A negative finding was made with respect to the Special Issue submitted at the sentencing phase pursuant to § 19.02(d) of the Penal Code. The petitioner timely filed notice of appeal.

On June 26, 2003, the Court of Appeals for the Fourteenth Supreme Judicial District affirmed the judgment in an unpublished opinion. The petitioner filed a Petition for Discretionary Review on July 25, 2003, which was subsequently refused by the Texas Court of Criminal Appeals on February 11, 2004.

STATEMENT OF FACTS

The evidence adduced at trial established that Richard Miller Walker, hereafter referred to as the petitioner,

shot and killed his former wife, Aneeka, on April 10, 2000. The petitioner was described as "very friendly, very nice, easy going in 1995 but sometime in 1996 his mood changed" due to marital problems with Aneeka. (RR 5 – 57-58). In 1996, the petitioner learned that Aneeka had engaged in an extra-marital affair with an individual she met on a cruise trip. (RR 5 – 58). According to Snezana Ortega, the petitioner's secretary, the petitioner became "obsessed with the infidelity"; "he talked about it all the time. He really wouldn't let it go." (RR 5 – 59-60). The couple divorced in 1999. (RR 5 – 60).

On April 5, 2000, the Wednesday before the fatal shooting herein, the petitioner, who had maintained a close relationship with the complainant, went to the family residence to see her and their two children, Travis and Weston. (RR 8 – 217-219). The petitioner noticed that the complainant was acting strange, which was odd due to the fact that, earlier in the day, she had brought him a rose and made love to him. (RR 8 – 200). The petitioner went to the master bedroom and found a "friend" of his, Wes Charlton, hiding in the closet. (RR 8 – 226). The complainant admitted to not only having a sexual relationship with Charlton that had been ongoing for several months, but also engaging in sexual intercourse with him while the children were present in the house. (RR 6 – 116; RR 8 – 223); (RR 9 – 15) . The petitioner, who had been led to believe that the complainant was interested in a reconciliation – on the previous weekend plans had been made to get remarried and, in fact, the complainant had purchased a new wedding band for the petitioner – became enraged and physically struck Charlton and the complainant. (RR 8 – 230-231). Clearly, this event put the petitioner in a downward spiral both emotionally and psychologically.

The petitioner felt hurt, betrayed, sadness and guilt. (RR 8 – 238).

On Thursday, the petitioner was described by Ms. Ortega as being "very upset and extremely emotional." (RR 5 – 117). Over the next several days, the petitioner went to see his neurologist, Dr. Gilmer, and obtained a prescription for Valium from his psychiatrist, Dr. Jennifer McKay. (RR 5 – 72).[1]

Over the course of the next several days, the petitioner was characterized as "not his normal self." (RR 6 – 52). On April 10, the day of the shooting, he "seemed quite upset" and was described as "like a zombie." (RR 6 – 7-8). He went to the family residence to pick up clothes and return a .9 millimeter pistol that he had taken to his farm the previous weekend. (RR 9 – 33). The complainant had returned to the residence and when the petitioner entered the house he asked her, "why have you gone through with this affair with Wes? I thought we had (made) some

[1] The petitioner had experienced grand mal seizures in the past and had been prescribed Tegretol (Carbatrol), an anti-convulsive medication. (RR 8 – 64). The petitioner described the sensations that precede a grand mal seizure as follows: "[Y]ou can feel it coming on. Like a panel of lights inside your head. Like in all those black and white Frankenstein movies, something going on and off." (RR 8 – 182). Regarding the seizure's effect on his vision, the petitioner stated, "It will taper down. . . . It goes to full light into nothing . . . , like you're going into a tunnel that has no lights. You're leaving the lights and all of a sudden you're in the darkness." (RR 8 – 184). The last time he experienced that "light" feeling he woke up an hour later on the floor. (RR 9 – 37). This testimony was corroborated by Dr. McKay, who testified that "[s]ome people have what is described as an aura which are sensations that let them know there's a grand mal seizure coming on. This could be sensations regarding narrowing or tunneling of vision, seeing stars or flickers of light in their field of vision." (RR 8 – 73).

promise(s) to each other?" (RR 9 – 34). As the complainant walked away from him, the petitioner stated, "Remember we had promises to tell each other if we were going to be dating or seeing somebody else, so we wouldn't destroy each others' hearts as it happened in the past." (RR 9 – 35). These comments were made in a "pleading" voice but the complainant walked away from the petitioner going upstairs. (RR 9 – 35). The petitioner followed the complainant upstairs where the gun cabinet was located asking her why she had brought Wes into the house "especially when the children were awake." (RR 9 – 36). At this juncture, the complainant "said something to the effect of, Rick, I don't have to tell you how many affairs I've had during the course of our marriage. I don't have to tell you how many dicks I've had in my mouth." (RR 9 – 36).

After the complainant made the preceding statement, the petitioner

> felt – time kinda stood still. It felt like that it might have been one millionth of a second. All these lights on the right side of my head started just going off like faster and faster . . . [T]he lights get – get to a certain intensity inside your head but actually feels like you are being blinded. And then like somebody being in a spotlight, and boom, the lights go out.

(RR 9 – 36-37). The next thing that the petitioner "consciously remember(ed)" was the complainant lying on the floor. (RR 9 – 37). He had no memory of actually pulling the trigger of the pistol and no specific recollection of where he and she were physically located within the room when the shooting occurred, although both of them were standing at the time. (RR 9 – 38-39).

When asked to describe the "emotional reaction" he experienced upon hearing the complainant making the aforementioned statement, he stated, "I guess it was a mix of rage, sadness, disappointment and disgust. I couldn't believe that those words had come out of her mouth." (RR 9 – 38-39). He recalled "the rage, and I could feel blood moving through my body and the . . . panel of lights on this side of my head." (RR 9 – 168-169). The feeling was "very, very intense, but it wasn't to the point that I was down." (RR 9 – 170). He did not "hear any of the shots, he did not see any of the shots. Just panels of lights, blackness." (RR 9 – 177). The petitioner never felt himself pulling the trigger four times;[2] then he "came back to reality." (RR 9 – 177-178). After seeing what he had just done, he placed the gun in his mouth but then thought about the children and decided not to kill himself. (RR 9 – 39).

Dr. Jerome Brown, a clinical psychologist, testified that he had seen the petitioner on numerous occasions after the shooting and chronicled a "rapid cycling of events that would cause him to feel good about the relationship (with the complainant), and then feel desperate about the relationship." (Vol. 9 – 201). The petitioner was experiencing "incredible stressors" with the relationship going up and down; with respect to the events of the week before the actual shooting, Dr. Brown stated there were "several days of extreme upset, desperate behavior on Rick's part." (Vol. 9 – 201). Dr. Brown was of the view that the petitioner

[2] Although he told Ms. Ortega that he had shot the complainant eight times, in fact, the gun was fired four times. (RR 6 – 210).

> Was suffering from what (is) call(ed) a dissociative state,[3] which rendered him not using judgment and reason about what he was doing at that particular moment and time . . . Thinking and judgment, as we know it, was suspended and he acted in an automatic unthinking, unreflective fashion to pull that trigger. Even though he could see with his eyes what was taking place, he did not think about what was taking place.

(Vol. 9 – 205-206). Dr. Brown further believed that the petitioner did not have the psychological functioning to act "intentionally" at the time of the shooting. (Vol. 9 – 206).

Dr. Brown testified that the last statement made by the complainant to the petitioner "ended it. In other words, it presented it with an intolerable trauma, and intolerable conflict between giving her up forever or staying with her and having her remain unfaithful. That was the straw that broke the camel's back. At that moment, his life ended as he knew it." (Vol. 9 – 210). The fact that the petitioner had discontinued taking his anti-seizure medication a few days before the shooting, itself became a stressor: "[w]hen a patient goes off anti-seizure medication they become at risk. They are at a greater risk for something happening to their tissue and their brain activity." (Vol. 9 – 212, 213). According to Dr. Brown,

> [s]omething happened on April 10th that day that was different. His reaction was more than rage. Something happened to him. He exhibited

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[3] Dr. Brown described a "dissociative state" as "a distinct altered state or consciousness that happens to people in extreme stress or trauma situations." (Vol. 9 – 208-209).

> symptoms that he had never exhibited before when he became angry and hit her. Something else happened to him. And that is what I believe occurred and that's why there's deterioration over time, and then something broke.

(Vol. 10 – 36).

REASONS FOR GRANTING THE PETITION

Texas courts refuse to acknowledge that § 19.02 of the Penal Code, which requires a defendant in a murder prosecution, at the sentencing phase of the proceedings, to prove by a preponderance of the evidence that the death of the deceased was caused "under the immediate influence of sudden passion arising from an adequate cause" in order to reduce the punishment from that of a first-degree felony to a second-degree felony, constitutes a violation of due process. Historically, in Texas and most jurisdictions, the prosecution bore the burden of negating "sudden passion arising from an adequate cause" by evidence beyond a reasonable doubt. In 1994, the Texas Legislature transformed what was heretofore a constituent element of the offense of murder into a factor to be considered solely at sentencing, and then, only if a defendant has affirmatively established by a preponderance of the evidence that "he caused the death under the immediate influence of sudden passion arising from an adequate cause." This case squarely raises the issue of whether Texas' realignment of an element of an offense into a sentencing factor and the concomitant shifting of the burden of proof to the accused can survive *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000).

Motions and objections by petitioner at trial

The petitioner filed a pretrial motion seeking a declaration that § 19.02(d) of the Texas Penal Code was unconstitutional and that due process required that the prosecution bear the burden of proving the absence of "sudden passion arising from an adequate cause" beyond a reasonable doubt. (CR – 127-133). The district court denied the motion prior to commencement of voir dire. (RR 4 – 4). As the record reflects, defense counsel timely and specifically requested that the jury be instructed at the guilt/innocence phase of the proceedings that the state was required to disprove "sudden passion arising from an adequate cause" beyond a reasonable doubt. The district court denied the request. (RR 13 – 158-159).

Analysis of § 19.02 of the Texas Penal Code

As presently formulated, § 19.02 proscribes the offense of murder. That section defines murder as (1) "intentionally or knowingly caus(ing) the death of an individual"; (2) "intend(ing) to cause serious bodily injury and commit(ing) an act clearly dangerous to human life that causes the death of an individual"; and (3) "engaging in conduct constituting what is commonly known as "felony murder." The punishment range for murder, a first degree felony, is by "imprisonment in the institutional division for life or for any term of not more than 99 years or less than 5 years." *See* Tex. Penal Code, § 12.32(a). Chapter 19 of the Penal Code entitled "Criminal Homicide," dispenses with the lesser charge of voluntary manslaughter. Section 19.02(d) provides that

> At the punishment stage of the trial, the defendant may raise the issue as to whether he caused

> the death under the immediate influence of sudden passion arising from an adequate cause. *If the defendant proves the issue in the affirmative by a preponderance of the evidence, the offense is a felony of the second degree.*[4]

(Emphasis added).

Historically, in Texas the prosecution bore the burden of negating "sudden passion arising from an adequate cause" and doing so by proof beyond a reasonable doubt. *Bradley v. State*, 688 S.W.2d 847, 851 (Tex. Crim. App. 1985), overruled on other grounds; *Moore v. State*, 969 S.W.2d 4 (Tex. Crim. App. 1998). This construct was eviscerated by the Texas Legislature when it amended § 19.02 of the Penal Code in 1994 and transformed "sudden passion arising from an adequate cause" from an *element* of the offense of murder into a *sentencing* factor where the defense assumes not only the burden of raising the issue by adducing relevant evidence respecting the same, but also bears the burden of affirmatively proving "sudden passion arising from an adequate cause" by a preponderance of the evidence. *See Robinson v. State*, 945 S.W.2d 336, 342 (Tex. App. – Austin 1997), *pet. ref'd*; and *Benavides v. State*, 992 S.W.2d 511, 523 (Tex. App. – Houston [1st Dist.] 1999):

> For murders like this, occurring before September 1, 1994, the requirement [for the prosecution] to negate sudden passion *as an element of murder* [beyond a reasonable doubt] was imposed by

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[4] The punishment range for a second-degree felony is by "imprisonment in the institutional division for any term of not more than 20 years or less than 2 years." *See* Tex. Penal Code, § 12.33(a).

> *Cobarrubio v. State*, 675 S.W.2d 749, 751 (Tex. Crim. App. 1993). That implied element of murder was deleted effective September 1, 1994 by legislation abolishing the offense of voluntary manslaughter and instead making the issue of "sudden passion arising from adequate cause" a punishment-stage issue for defendants found guilty of murder.

Mullaney v. Wilbur and its progeny

In 1975, the Supreme Court decided *Mullaney v. Wilbur*, 421 U.S. 684, 95 S.Ct. 1881, 44 L.Ed.2d 518 (1975), which held that the Due Process Clause of the Fourteenth Amendment required that the prosecution prove beyond a reasonable doubt the *absence* of heat of passion on sudden provocation when that issue is raised at trial. As the Court reasoned,

> [i]n the past half century, a large majority of States . . . require the prosecution to prove the absence of the heat of passion on sudden provocation beyond a reasonable doubt. *See* W. LaFave & A. Scott, *Handbook on Criminal Law*, pp. 539-540 (1972).
>
> This historical review establishes two important points. First, the fact at issue here – the presence or absence of the heat of passion on sudden provocation – has been, almost from the inception of the common law of homicide, *the single most important factor in determining the degree of culpability attaching to an unlawful homicide. And, second, the clear trend has been toward requiring the prosecution to bear the ultimate burden of proving this fact. Id.* at 696. (Emphasis added).

By not requiring the prosecution to prove beyond a reasonable doubt that the killing did not occur "in the heat of passion" – a factor that establishes less blameworthiness in the substantive law of homicide – the statute "denigrate(d) the interest found critical in (*In re*) *Winship* (397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970))." *Mullaney*, 421 U.S. at 698.[5] Because the criminal law "is concerned not only with guilt or innocence in the abstract but also *with the degree of criminal culpability*," a State could thwart the due process interest that *In re Winship* sought to protect by merely

> *Redefin(ing) the elements that constitute different crimes, characterizing them as factors that bear solely on the extent of punishment* . . . The result, in a case such as this or where the defendant is required to prove the critical fact in dispute, is to increase further the likelihood of an erroneous murder conviction. Such a result directly contravenes the principle articulated in *Speiser v. Randall*, 357 U.S. 513, 525-526, 78 S.Ct. 1332, 1342, 2 L.Ed.2d 1460 (1958):
>
> [w]here one party has at stake an interest of transcending value – as a criminal defendant his liberty – th[e] margin of error is reduced as to him by the process of placing on the [prosecution] the burden . . . of persuading the fact-finder at the conclusion of the trial. . . .

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[5] In *Winship*, the Court held that the State bore the burden in all criminal prosecutions to prove beyond a reasonable doubt each element of the offense – "*the existence of every fact necessary to constitute the crime charged*." 397 U.S. at 363. (Emphasis added).

See also In re Winship, 397 U.S. at 370-372, 90 S.Ct. at 1075-1076 (Harlan, J., concurring); *Mullaney*, 421 U.S. at 701.

Two years later in *Patterson v. New York*, 432 U.S. 197, 97 S.Ct. 2319, 53 L.Ed.2d 281 (1977), the Supreme Court apparently narrowed its previous holding in *Mullaney* and authorized states to require the defendant to shoulder the burden of proving an affirmative defense such as "he acted with heat of passion upon sudden provocation." *Id.* at 216. In dissent, Justice Powell, who had authored the *Mullaney* opinion, asserted that "[i]n *Mullaney* we concluded that heat of passion was one of the 'facts' described in *Winship* – that is, *a factor as to which the prosecution must bear the burden of persuasion beyond a reasonable doubt.*" *Id.* at 225-226. (Emphasis added). This result, according to Justice Powell, was reached based primarily on two considerations: "The presence or absence of heat of passion made a substantial difference in punishment of the offender and in the stigma associated with a conviction"; and "heat of passion 'has been, almost from the inception of the common law of homicide, the single most important factor in determining the degree of culpability attaching to an unlawful homicide.'" *Id.* at 226.

Enter *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), wherein the Supreme Court held that any fact, besides recidivism, that increases the punishment for a crime beyond prescribed statutory maximums must be submitted to the jury and proved by the prosecution beyond a reasonable doubt. The *Apprendi* Court reaffirmed the principle that "'the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of *every fact* necessary to constitute the crime with which he is charged.'" *Apprendi*,

530 U.S. at 477. (Emphasis added). As the Court reasoned, "[a]ny possible distinction between the 'element of a felony offense' and a 'sentencing factor' was unknown to the practice of criminal indictment, trial by jury, and judgment by court, as it existed during the years surrounding our Nation's founding." *Id.* at 478. Moreover, "[s]ince *Winship*," the Court has "made clear beyond peradventure that *Winship*'s due process and associated jury protections extend, to some degree, *'to determinations that [g]o not to a defendant's guilt or innocence, but simply to the length of his sentence.'*" *Id.* at 484. (Emphasis added).

The *Apprendi* majority *reaffirmed Mullaney*'s holding that the "'consequences' of a guilty verdict for murder and for manslaughter differed substantially" and the States are *not* free to "circumvent the protections of *Winship* merely by *'redefin(ing) the elements that constitute different crimes, characterizing them as factors that bear solely on the extent of punishment.'*" *Apprendi*, 530 U.S. at 485, quoting *Mullaney*, 421 U.S. at 698, 95 S.Ct. 1881. (Emphasis added). The *Apprendi* Court ultimately held that "merely because the State Legislature placed its hate crime sentence 'enhancer' within the sentencing provisions of the criminal code 'does not mean that the finding of a biased purpose to intimidate is not an essential element of the offense.'" *Id.* at 495.

The dissenters in *Apprendi* observed,

> It is difficult to understand why the rule adopted by the Court in today's case (or the broader rule advocated by Justice Thomas) *would not require the overruling of Patterson.* Unless the Court is willing to defer to a legislature's formal definition of the elements in an offense, it is clear that the fact that Patterson did

> not act under the influence of extreme emotional disturbance, in substance, 'increase[d] the penalty for [his] crime beyond the prescribed statutory maximum 'for first degree manslaughter' and, hence, *made it incumbent upon the prosecution to prove beyond a reasonable doubt.*

530 U.S. at 531 (O'Connor, J., dissenting opinion). *See also, Ring v. Arizona*, 536 U.S. 584, 618, 122 S.Ct. 2428, 2448, 153 L.Ed.2d 556 (2002) (dissenting opinion, O'Connor, J.) (*Apprendi* "directly contradicts several of our prior cases" citing, *inter alia*, *Patterson v. New York, supra*).

It is submitted that *Apprendi* has called into question the notion that *Patterson sub silentio* overruled *Mullaney* and that, in fact, *Mullaney*'s holding and rationale has now been reaffirmed. Although states enjoy some latitude in formulating their penal statutes, they cannot, consistent with due process, "'reallocate burdens of proof by labeling as affirmative defenses at least some elements of the crimes now defined in their statutes.'" *Apprendi*, 530 U.S. at 484, fn. 12. As *Mullaney* itself made clear, there are "obviously constitutional limits beyond which the States may not go in this regard." *Mullaney*, 432 U.S. at 210.

In overruling the petitioner's arguments below, the Court of Appeals relied primarily on *Patterson v. New York*, 432 U.S. 197 (1977), and several state court of appeals' decisions which *pre-date Apprendi*.[6] The Court of

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[6] *Vasquez v. State*, 2 S.W.3d 355, 361 (Tex. App. – San Antonio 1999), pet. ref'd; *Green v. State*, 971 S.W.2d 639, 644 (Tex. App. –

(Continued on following page)

Appeals was of the view that "Section 19.02(d) does not place a burden on a defendant on an issue increasing the punishment range. Rather, it gives the defendant an opportunity to decrease the applicable range of punishment." (Opin. at 5). According to the Court of Appeals, "[t]he Constitution does not prohibit the State from putting the burden on the defendant to prove an issue in mitigation of punishment." *Id.* As the Court of Appeals reasoned, "[t]he proper inquiry, therefore, is whether the required finding exposes the defendant to a greater punishment than that authorized by the jury's guilty verdict." *Basso v. State*, No. 73,672, slip op. at 31, 2003, WL 1702283, at 18 (Tex. Crim. App. January 15, 2003).[7] (Opin. at 4-5).

This reasoning misses the mark. Although the continued viability of *Patterson v. New York* has been drawn into serious question by *Apprendi*, *Patterson* itself "made clear that the state law still required the State to prove every

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Houston [14th Dist.] 1998), pet. ref'd; and *Robinson v. State*, 945 S.W.2d 336, 341 (Tex. App. – Austin 1997), *pet. ref'd.* (Opin. at 4).

[7] It is respectfully submitted that *Basso v. State, supra*, is not germane to the issue presented herein. *Basso* dealt with the question whether *Apprendi* "requires that the State prove the absence of mitigating circumstances beyond a reasonable doubt" *in a death penalty prosecution*. *Id.* In *Basso*, the Court of Criminal Appeals held that *Apprendi* had no applicability to Texas' death penalty scheme because "[a] jury will answer the mitigation special issue only 'if [it] returns an affirmative finding to each issue submitted under Subsection (b) [of] Art. 37.071, Sec. (2)(e)(1).' *In other words, a jury finding on mitigation occurs only after the State has proven the elements of capital murder, at the guilt phase, and the aggravating circumstances – evidence of the defendant's future dangerousness – beyond a reasonable doubt.*" *Id.* (Emphasis added).

element of the State's offense of murder *and its accompanying punishment.*" *Apprendi*, 530 U.S. at 484, footnote 12. (Emphasis added). This must be contrasted with § 19.02(d) as presently formulated, which *relieves* the State of the burden of proving the "accompanying punishment" associated with the statute by foisting on the defense both the burden of production, as well as the burden of persuasion to convince the jury that "sudden passion arising from an adequate cause" has been established and that the applicable punishment range is that of a second-degree felony. Historically and traditionally, "sudden passion arising from an adequate cause" "*has been, almost from the inception of the common law of homicide*, the single most important factor in determining the degree of culpability attaching to an unlawful homicide." *Mullaney*, 421 U.S. at 696. Accordingly, "the State lacked the discretion to omit 'traditional' elements from the definition of crimes and instead to require the accused to disprove such elements." *Jones v. United States*, 526 U.S. 227, 240, 119 S.Ct. 1215, 143 L.Ed.2d 311 (1999).

In a compelling dissent, Justice Powell, in *Martin v. Ohio*, 480 U.S. 228, 241, 107 S.Ct. 1098, 1106, 94 L.Ed.2d 267 (1987), addressed the constitutional frailties of the *Patterson* decision with respect to the shifting of the burden of proof in criminal trials by legislative recasting of elements of an offense into mere sentencing factors:

> I continue to believe that the better method for deciding when a State may shift the burden of proof is outlined in the Court's opinion in *Mullaney* and in my dissenting opinion in *Patterson*. In *Mullaney*, we emphasized that the state's obligation to prove certain facts beyond a reasonable doubt was not necessarily restricted to legislative distinctions between offenses and affirmative defenses.

The boundaries of the state's authority in this respect were elaborated in the *Patterson* dissent, where I proposed a two-part inquiry:

> "The Due Process Clause requires that the prosecutor bear the burden of persuasion beyond a reasonable doubt only if the factor at issue makes a substantial difference in punishment and stigma. The requirement of course applies *a fortiori* if the factor makes the difference between guilt and innocence.... It also must be shown that in the Anglo-American legal tradition the factor in question historically has held that level of importance. If either branch of the test is not met, then the legislature retains its traditional authority over matters of proof." 432 U.S., at 226-227, 97 S.Ct., at 2335 (footnotes omitted).

Cf. *McMillan v. Pennsylvania,* 477 U.S. 79, 103, 106 S.Ct. 2411, 2425, 91 L.Ed.2d 67 (1986) (STEVENS, J., dissenting) ("[I]f a State provides that a specific component of a prohibited transaction shall give rise both to a special stigma and to a special punishment, that component must be treated as a 'fact necessary to constitute the crime' within the meaning of our holding in *In re Winship*").

There are at least two benefits to this approach. *First, it ensures that the critical facts necessary to sustain a conviction will be proved by the state. Because the Court would be willing to look beyond the text of a state statute, legislatures would have no incentive to redefine essential elements of an offense to make them part of an affirmative defense, thereby shifting the burden of proof in a manner inconsistent with Winship and Mullaney.* Second, it would leave the

> states free in all other respects to recognize new factors that may mitigate the degree of criminality or punishment, without requiring that they also bear the burden of disproving these defenses . . . .

Id. at 242-243. (Emphasis added).

Simply stated, legislatures cannot constitutionally reconfigure the elements of a penal statute – such as that of "sudden passion arising from an adequate cause" – which has been "almost from the inception of the common law of homicide the single most important factor in determining the degree of culpability attaching to an unlawful homicide," and transform them into sentencing or punishment factors which impermissibly shift the burden of proof to the accused and eliminate the requirement that a jury find the existence (or absence of) an element beyond a reasonable doubt.

The Court of Appeals chose not to specifically address petitioner's argument advanced below that Justice O'Connor, in her dissenting opinion in *Apprendi*, asserted that "[I]t is difficult to understand why the rule adopted by the Court in today's case (or the broader rule advocated by Justice Thomas) would not require the overruling of *Patterson*." *Apprendi*, 530 U.S. at 531 (O'Connor, J., dissenting opinion). Section 19.02(d) on its face, and, as applied, violates due process of law and cannot stand.

In *McMillan v. Pennsylvania*, 477 U.S. 79, 86, 106 S.Ct. 2411, 2416, 91 L.Ed.2d 67 (1986), the Court observed that it had "never attempted to define precisely the constitutional limits noted in *Patterson*, *i.e.*, the extent to which due process forbids the reallocation or reduction of burdens of

proof in criminal cases. . . . " This case presents the Court with that opportunity.

As the record reflects, defense counsel timely and specifically requested at the close of the evidence at the guilt/innocence phase of the trial that the burden of proof be placed on the prosecution to disprove "sudden passion arising from an adequate cause" beyond a reasonable doubt. The district court denied the request. (RR 13 – 158-159). Based on the aforementioned argument, the shifting of the burden to the petitioner of establishing "sudden passion arising from adequate cause" by a preponderance of the evidence, as opposed to requiring the state to disprove the same by evidence beyond a reasonable doubt, violates due process of law.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

Affirmed and Memorandum Opinion filed June 26, 2003.

[SEAL]

In The

Fourteenth Court of Appeals

NO. 14-01-01197-CR

RICHARD MILLER WALKER, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 338th District Court
Harris County, Texas
Trial Court Cause No. 841,603

MEMORANDUM OPINION

Appellant, Richard Miller Walker, was convicted by a jury of murder. In four points of error, appellant claims: (1) section 19.02(d) of the Penal Code violates due process of law; (2) the trial court erred in refusing to place the burden on the State to disprove that appellant acted with "sudden passion arising from an adequate cause" as requested by the defense; (3) the trial court erred in permitting the prosecution to cross-examine appellant as to an extraneous offense; and (4) the trial court erred in refusing to allow defense counsel to make opening and concluding final argument at the sentencing phase of trial. We affirm.

Background

The appellant and complainant, Aneeka Dawn Walker, were married in July of 1984 and resided at a home on Drexel Street in Houston. In 1996, the couple began experiencing marital problems after the appellant learned the complainant allegedly had an extra-marital affair. According to Snezana Ortega, the appellant's secretary, appellant became obsessed with the infidelity. The couple divorced in December of 1999.

On April 5, 2000, the Wednesday before the fatal shooting, the appellant went to the family home. He discovered a man in the complainant's bedroom closet and became enraged. The appellant repeatedly kicked the man and punched the complainant in the face numerous times. The following Saturday, April 8, appellant picked up his children to take them to his family's farm in Caldwell, Texas. He took his .9 millimeter pistol with him.

On April 10, 2000, witnesses reported hearing a gun shot at the Drexel residence and then seeing appellant exit his home carrying a brown paper bag. At approximately 12:30 p.m., appellant telephoned Ortega and stated, "I just killed Aneeka." He told her that he had fired eight shots into the complainant's head. Ortega then notified the appellant's parents, who went to the Drexel residence and observed the complainant's car parked outside. During a telephone conversation with his parents, the appellant told his father not to go inside or to call the police.

The following day, appellant's parents met with an attorney who then contacted the Houston Police Department. The police went to the Drexel residence where they found the complainant's body in an upstairs room. Physical evidence showed that four shots had been fired from a

.9 millimeter Glock pistol owned by appellant. He was subsequently indicted and convicted of murder.

At the punishment phase of trial, the trial court submitted the following special issue to the jury:

> Do you the Jury find by a preponderance of the evidence that the defendant caused the death of Anneka Dawn Walker under the immediate influence of sudden passion arising from an adequate cause?

The jury answered, "We do not," and sentenced appellant to a term of 75 years' confinement and a fine of $10,000.

Constitutionality of § 19.02(d)

In appellant's first point of error he claims section 19.02(d) of the Penal Code is unconstitutional in that it violates due process of law by placing the burden on the defendant to prove by a preponderance of the evidence "sudden passion arising from an adequate cause." Appellant's second point of error alleges the trial court erred in refusing to place the burden on the State to disprove that the defendant acted with "sudden passion arising from an adequate cause" as requested by the defense.

Under the 1974 Penal Code, the State had the burden of disproving sudden passion when the issue was raised. *See Nance v. State,* 807 S.W.2d 855, 860 (Tex. App. – Corpus Christi 1991, pet. ref'd). In 1993, the Texas Legislature repealed the offense of voluntary manslaughter, in which the State had to prove that the defendant caused death under the immediate influence of sudden passion arising from an adequate cause, and added the language in 19.02(d) requiring the defendant to prove sudden

passion during the punishment phase to reduce murder to a second degree felony. *See* Act of June 19, 1993, 73rd Leg., R.S., ch. 900, § 1.01, 1993 Tex. Gen. Laws 3586, 3613-14.

Texas courts have consistently upheld the constitutionality of section 19.02 relying primarily on *Patterson v. New York,* 432 U.S. 197 (1977). *See Leifester v. State,* 2001 WL 1587407, at *4 (Tex. App. – Houston [1st Dist.] 2001, pet. ref'd) (not designated for publication); *Vasquez v. State,* 2 S.W.3d 355, 361 (Tex. App. – San Antonio 1999, pet. ref'd); *Green v. State,* 971 S.W.2d 639, 644 (Tex. App. – Houston [14th Dist.] 1998, pet. ref'd); *Robinson v. State,* 945 S.W.2d 336, 341 (Tex. App. – Austin 1997, pet. ref'd) (case of first impression regarding constitutionality of section 19.02(d)). In *Patterson,* the United States Supreme Court upheld the constitutionality of a New York murder statute similar to section 19.02. The New York statute provided for an affirmative defense where the defendant "acted under the influence of extreme emotional disturbance for which there was a reasonable explanation or excuse." *Patterson,* 432 U.S. at 198 n. 2. The Supreme Court held that "all circumstances of excuse or alleviation rested on the defendant." *Id.* at 202. Finding no distinction between the affirmative defense the defendant had the burden of proving in *Patterson* and section 19.02(d), Texas courts have found that section 19.02(d) does not violate the due process clause of the United States Constitution or the Texas Constitution. *Vasquez,* 2 S.W.3d at 362 (placing burden on defendant to prove sudden passion is constitutional).

Appellant argues, however, the recent United States Supreme Court decision in *Apprendi* calls the constitutionality of section 19.02 into question. *Apprendi v. New Jersey,* 530 U.S. 465 (2000). We disagree. The Court held

in *Apprendi* that "other than a fact of prior conviction, any fact that increases the penalty for crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt." *Id.* at 492. The New Jersey statute allowed a jury to convict a defendant of a second degree offense based on its finding beyond a reasonable doubt that the defendant illegally possessed a weapon. A subsequent and separate proceeding was then held for the judge to determine, by a preponderance of the evidence, if the defendant possessed the weapon with an intent to intimidate victims on the basis of personal characteristics, such as race. If the judge found in the affirmative, he or she may then impose a punishment equivalent to a first degree offense. The proper inquiry, therefore, is whether the required finding exposes the defendant to a greater punishment than that authorized by the jury's guilty verdict. *Basso v. State,* No. 73,672, slip op. at 31, 2003 WL 1702283, at *18 (Tex. Crim. App., Jan. 15, 2003) (finding that under Article 37.071, there is no authorized increase in punishment contingent on the jury's finding on the mitigation special issue). Here, we find that it does not.

In contrast to the New Jersey statute, section 19.02(d) does not place a burden on a defendant on an issue increasing the punishment range. Rather, it gives the defendant an opportunity to decrease the applicable range of punishment. The Constitution does not prohibit the state from putting the burden on the defendant to prove an issue in mitigation of punishment. *See Vasquez,* 2 S.W.3d at 361; *Fleming v. State,* 956 S.W.2d 620, 622 (Tex. App. – Eastland 1997, pet ref'd); *Jones v. State,* 955 S.W.2d 438, 440 (Tex. App. – Fort Worth 1997, pet. ref'd). Therefore, *Apprendi* is inapplicable.

Appellant's first and second points of error are overruled.

Extraneous Evidence

In his third point of error, appellant contends the trial court erred in allowing the State to cross-examine him about an extraneous offense that was inadmissible and not supported by any proof admitted at trial. The complained of testimony is as follows:

> Q: Sir, do you recall an incident where in an attempt to get her (complainant) to confess to this affair, you put a gun to her head? Did that happen?
>
> A: No.
>
> Q: Never happened?
>
> A: No.
>
> Q: You were never that angry, sir, that you would take one of those guns that you often had out at the ranch and put it to her head?
>
> A: No.
>
> Q: Just didn't happen?
>
> A: Did not.

1. Notice

Appellant correctly points out that the State's "Sixth Amended Notice of Intent Under Rule 404(b), Rule 609, Tex. Crim. Proc. Art. 38.36 and 37.07 and Rebuttal" failed to include notice with regards to a prior incident wherein the appellant held a gun to complainant's head. However,

appellant did not object at trial to the State's failure to give notice of its intent to introduce an extraneous offense. Appellant's only objection was that the evidence had not been shown admissible under Texas Rule of Evidence 403. To preserve error for appeal, an appellant's objection on appeal must comport with his objection in the trial court. *See Knox v. State,* 934 S.W.2d 678, 787 (Tex. Crim. App. 1996). Because appellant did not object to the extraneous offense evidence on the basis of lack of notice, appellant did not preserve this complaint for review.

2. Character Evidence

Appellant did, however, object to the evidence as being both improper and prejudicial.[1] Evidence of an extraneous offense may be admitted if it has relevance apart from its tendency to prove the character of a person in order to show that he acted in conformity therewith. *See* TEX. R. EVID. 404(b). Such evidence has relevance apart from character conformity when it tends to establish some elemental fact, such as identity or intent. *See Montgomery v. State,* 810 S.W.2d 372, 387-88 (Tex. Crim. App. 1990); *Aitch v. State,* 879 S.W.2d 167, 174 (Tex. App. – Houston [14th Dist.] 1994, pet. ref'd). Although relevant, such evidence may be excluded under Rule 403 if its probative value is substantially outweighed by the danger of unfair prejudice. This analysis is to be conducted by the trial

[1] Appellant argues the State's cross-examination regarding the extraneous offense was conducted in bad faith. It is well settled that the examiner must have a good-faith belief the event inquired of occurred. However, appellant failed to preserve error for review by not making a timely, specific objection on this ground. *See* TEX. R. APP. P. 33.1(a).

judge in light of the unique facts and circumstances of each case, and will not be disturbed on appeal unless it is outside the zone of reasonable disagreement. *See Montgomery,* 810 S.W.2d at 391.

Whether or not appellant had offered evidence in mitigation at the time the extraneous offense was admitted, the State was required to show intent as an element of the charged offense. *See* TEX. PENAL CODE ANN. § 19.02(b)(1) (Vernon 1994). In a prosecution for murder, the State or the defendant may "offer testimony as to all relevant facts and circumstances surrounding the killing and the previous relationship existing between the accused and the deceased, together with all relevant facts and circumstances going to show the condition of the mind of the accused at the time of the offense." TEX. CODE CRIM. PROC. ANN. art. 38.36(a) (Vernon Supp. 2003). Testimony regarding appellant's prior holding of a gun to the complainant's head clearly is probative of the relationship between appellant and the complainant and appellant's state of mind at the time of the offense, and therefore is relevant apart from character conformity.

Once evidence is determined to be relevant, it is admissible unless the unfair prejudicial effect of the evidence substantially outweighs its probative value. *See* TEX. R. EVID. 403. All evidence is prejudicial to the opposing party to some extent. To prove error in admission of evidence, appellant must show that it was unduly prejudicial, and that its probative value is substantially outweighed by the danger of unfair prejudice. *See Montgomery,* 810 S.W.2d at 377-78. Rule 403 favors the admissibility of relevant evidence, "and the presumption is that relevant evidence will be more probative than prejudicial." *Id.* at 389. Thus, "trial courts should favor admission in close

cases, in keeping with the presumption of admissibility of relevant evidence." *Id.*

Factors relevant to balancing the probative value of extraneous offenses include the similarity between the prior act and the offense charged, the closeness in time of the extraneous transaction to the charged offense, and the availability of alternative sources of proof. *See Robinson v. State,* 701 S.W.2d 895, 898 (Tex. Crim. App.1985). In the present case, appellant's prior wielding of a gun against complainant indicates the offense was not an isolated act of sudden passion. *See Sattiewhite v. State,* 786 S.W.2d 271, 285 (Tex. Crim. App. 1989). Absent evidence of appellant's prior assaultive conduct toward complainant, the jury would have been deprived of important information concerning the nature of the couple's relationship. These factors, coupled with the short duration of the exchange and appellant's denial of the incident, support the trial court's conclusion that the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice. *See Green,* 971 S.W.2d at 645. Point of error three is overruled.

Final Arguments

In appellant's fourth point of error, he contends the trial court erred in refusing to allow defense counsel to make the opening and concluding final argument at the sentencing phase of the trial, when appellant had the burden of proof to establish "sudden passion." The order of argument of counsel is within the discretion of and may be regulated by the trial court, except that counsel for the State shall have the right to make the concluding address to the jury. TEX. CODE. CRIM. PRO. ANN. art. 36.07 (Vernon

1981); *Nelson v. State,* 828 S.W.2d 185, 187 (Tex. App.–Houston [14th Dist.] 1992, pet. ref'd). It has long been the rule in Texas that the State has the right to make the closing argument to the jury at the punishment phase. *See Garcia v. State,* 537 S.W.2d 930 (Tex. Crim. App. 1976). Further, in *Martinez v. State,* 501 S.W.2d 130 (Tex. Crim. App. 1973), the Court of Criminal Appeals found the defendant was not entitled to open and close jury arguments even where the defendant had the burden of proving the affirmative defense of insanity.

Appellant argues, however, that the instant case is distinguishable from *Martinez* in that it deals with the punishment phase, rather than the guilt/innocence phase, of trial. He notes that the *Martinez* court reasoned that although the defendant bears the burden of establishing the defense of insanity by a preponderance of the evidence, the State still must prove the defendant's guilt beyond a reasonable doubt. *See id.* at 131. We find the rationale in *Martinez* applicable here. As noted above, the court's charge at the punishment phase included a special issue on sudden passion, which the defense had the burden of proving by a preponderance of the evidence. The charge also included an instruction on extraneous offenses, which the State was required to prove beyond a reasonable doubt. Given the dual burdens of proof, we find the trial court did not abuse its discretion in denying appellant's request to make the opening and concluding argument at the punishment phase. Accordingly, appellant's fourth point of error is overruled.

There being no reversible error, the judgment of the trial court is affirmed.[2]

/s/ Leslie BrockYates
Justice

Judgment rendered and Opinion filed June 26, 2003.
Panel consists of Justices Yates, Frost, and Draughn.[3]
Do Not Publish – TEX. R. APP. P. 47.3(b).

[2] Having found no reversible error, we need not address the State's conditional cross-point.

[3] Senior Justice Joe L. Draughn sitting by assignment

June 26, 2003

[SEAL]

JUDGMENT

The Fourteenth Court of Appeals

RICHARD MILLER WALKER, Appellant

NO. 14-01-01197-CR V.

THE STATE OF TEXAS, Appellee

This cause was heard on the transcript of the record of the court below. Having considered the record, this Court holds that there was no error in the judgment. The Court orders the judgment **AFFIRMED**, that the appellant pay all costs expended in this appeal, and that this decision be certified below for observance.

APPENDIX B

OFFICIAL NOTICE FROM
COURT OF CRIMINAL APPEALS OF TEXAS
P.O. BOX 12308, CAPITOL STATION,
AUSTIN, TEXAS 78711

2/11/2004 [STAMP]
COA#: 14-01-01197-CR
RE: Case No. PD-1576-03
STYLE: WALKER, RICHARD

On this day, the Appellant's petition for discretionary review has been refused.

Troy C. Bennett, Jr.

George McCall Secrest, Jr.
Attorney at Law
808 Travis Street
24th Floor
Houston, TX 77002